No. _____

IN THE

Supreme Court of the United States

JOHN NYPL,

Petitioner,

v.

JPMORGAN CHASE & CO. *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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November 30, 2020

QUESTIONS PRESENTED

Whether this Court should decide an important question of federal law that has not been, but should be, settled by this Court, with regard to the applicable burden on a moving-party seeking to quash the subpoena of a non-party witness under Fed. R. Civ. P. 45(d)(3).

Whether, under Fed. R. Civ. P. 45, the court where subpoena compliance is required must weigh and/or defer to the opinion of the court where the action is pending in ruling on a motion to quash the subpoena of a non-party witness.

PARTIES TO THE PROCEEDINGS

Petitioners in this Court, Plaintiffs-Appellants below are:

JOHN NYPL, AN INDIVIDUAL; LISA MCCARTHY, AN INDIVIDUAL; MAD TRAVEL, INC. A.K.A. TRAVEL LEADERS; VALARIE JOLLY, AN INDIVIDUAL; GO EVERYWHERE, INC., A CORPORATION; WILLIAM RUBINSOHN DOING BUSINESS AS RUBINSOHN TRAVEL ON BEHALF OF THEMSELVES AND THOSE SIMILARLY SITUATED.

Respondents in this Court are:

Defendants-Appellees

JP MORGAN CHASE & CO; J.P. MORGAN CHASE BANK, N.A.; BANK OF AMERICA CORPORATION; BANK OF AMERICA N.A.; HSBC BANK USA, N.A.; HSBC NORTH AMERICAN HOLDINGS, INC.; CITIGROUP, INC.; CITIBANK, N.A.; CITICORP.; UBS AG, BARCLAYS PLC; BARCLAYS CAPITAL, INC.; ROYAL BANK OF SCOTLAND, PLC; and

Real-Party-In-Interest-Appellee

SIMON FOWLES; and

Movant-Appellee:

Wells Fargo.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, no petitioner has a parent company and no publicly held company owns 10% or more of any petitioner's stock.

RELATED CASES

Nypl v. JPMorgan Chase & Co., Case No., 19-15293 (9th Cir. Apr. 28, 2020).

Nypl v. JPMorgan Chase & Co., Case No., Case No., 3:18-mc-80209-JCS (N.D. Cal. Jan. 18, 2019).

Nypl, et al. v. JPMorgan Chase & Co., et al., Case No. :15:cv-9300 (S.D.N.Y. case is pending).

In re Foreign Exchange Benchmark Rates Antitrust Litigation, 1:13-cv-07789-LGS (S.D.N.Y. case is pending).

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REQUESTED RELIEF

Petitioners respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit in this case, that this Court reverse the decision of the Court of Appeals.

OPINIONS BELOW

The opinion of the Court of Appeals is Appendix to Petition for Writ of Certiorari ("App." 1-5). The opinions of the district court (App. 7-8 and App. 11-26) are unreported.

JURISDICTION

The Court of Appeals rendered its decision on April 28, 2020. (App. 1-5). The court denied a timely Petition for Rehearing *En Banc* on July 1, 2020. (App. 9-10). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Petitioners now file this Petition for Writ of Certiorari on November 30, 2020.

STATUTORY PROVISIONS INVOLVED

Fed. R. Civ. P. 45(d)(3)(B)(i)-(ii) provides, in pertinent part, as follows:

To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

STATEMENT OF THE CASE

The Underlying Action

The Plaintiffs herein filed the underlying action in the United States District Court for the Northern District of California in May 2015, which was ultimately transferred to the United States District Court for the Southern District of New York in November 2015. That case is *Nypl v. JP Morgan Chase & Co. et al.,* Southern District of New York Case No. 15-cv-9300 (LGS). (See S.D.N.Y. Dkt. Nos. 1 and 53). The operative version of Plaintiffs' Complaint, the Third Amended Complaint ("TAC"), was filed on August 10, 2017. [Dkt. No. 3 at p. 27].

Plaintiffs John Nypl, *et al.* ("Plaintiffs") brought suit on behalf of a nationwide putative class of purchasers and end-users of foreign currency transactions from banks at benchmark exchange rates fixed, rigged, and manipulated by Bank of America Corporation, Bank of America, N.A. (collectively "Bank of America"), JP Morgan Chase & Co, J.P. Morgan Bank, N.A., JP Morgan Chase Bank, N.A., (collectively "Chase"), HSBC Bank USA, N.A., HSBC North American Holdings (collectively "HSBC"), Citigroup, Inc., Citicorp, Citibank, N.A., (collectively "Citibank"), UBS AG ("UBS"), Barclays PLC, Barclays Capital, Inc., (collectively "Barclays"), Royal Bank of Scotland, PLC ("RBS"), and other unnamed

co-conspirators, pursuant to a conspiracy, combination and agreement to fix, rig and manipulate foreign currency benchmark exchange rates in violation of section 1 of the Sherman Act (15 U.S.C. § 1). [Dkt. No. 3 at p. 27; TAC at p. 1]. The *Nypl* Plaintiffs seek injunctive relief and monetary damages, including treble damages, to compensate them for overcharge damages caused by reason of the unlawful conspiracy. (*Id.*).

The TAC references, attaches, and incorporates factual allegations derived from guilty pleas entered into by the defendant banks and other documents. [Dkt. No. 3 at pp. 39-42, 58-138; TAC, ¶¶ 43- 56]. The unlawful conduct described in the TAC and its attachments allege that between December 2007 and January 2013, euro-dollar traders at defendant banks and other unnamed co-conspirators– self-described members of "The Cartel" – used an exclusive electronic chat room and coded language to manipulate benchmark exchange rates. [Dkt. No. 3 at pp. 37, 60-61, 63-64, 89-95, 110, 127-128]. Those rates are set through, among other ways, two major daily "fixes," the 2:15 p.m. European Central Bank fix and the 4:00 p.m. World Markets/Reuters fix. [Dkt. No. 3 at p. 41, 63-64, 89-91, 125-127]. Third parties collect trading data at these times to calculate and publish a daily "fix rate," which in turn is used to price orders for many large customers. *Id.* "The Cartel" traders coordinated their trading of U.S. dollars and euros to manipulate the benchmark rates set at the 2:15 p.m. and 4:00 p.m. fixes in an effort to increase their profits. *Id.* The traders also used their electronic chats to manipulate the

euro-dollar exchange rate in other ways. Members of "The Cartel" manipulated the euro-dollar exchange rate by agreeing to withhold bids or offers for euros or dollars to avoid moving the exchange rate in a direction adverse to open positions held by co-conspirators. *Id.* By agreeing not to buy or sell at certain times, the traders protected each other's trading positions by withholding supply of or demand for currency and suppressing competition in the FX market. *Id.*

While the TAC identifies specific defendant banks, it further alleges that, "various persons, firms, corporations, organizations, and other business entities, some unknown and others known, have participated as co-conspirators in the violations alleged and have performed acts in furtherance of the conspiracies. Plaintiffs may seek leave to amend this complaint to add the co-conspirators, known and unknown as Defendants." [Dkt. No. 3 at p. 37; TAC, ¶ 37].

Fowles' Complaint

On April 11, 2018, Appellee Simon Fowles filed a Complaint against Wells Fargo Bank in San Francisco Superior Court, which was removed to the Northern District of California and then later remanded to Superior Court. [Dkt. No. 3 at pp. 140- 152]. Fowles' Complaint alleges, *inter alia*:

> Simon Fowles [the subpoenaed deponent] joined ... Wells Fargo, Inc ... in April 1996 as a Senior Foreign Exchange (FX)Trader. In 1998 he was promoted to Head of FX Trading in San Francisco. During [Mr. Fowles] twenty-one year and seven-month tenure with Wells Fargo, he was promoted to Executive Vice President, managed a global team of up to 65 traders, and was part of the FX senior management team.
>
> ***

> Plaintiff had made repeated, strident, clear and unambiguous complaints to many members of the Well[s] Fargo's upper level management team about the significant risks of illegal activity, mail and wire fraud, unlawful profiteering, and regulatory violations that would inevitably and certainly result from the compensation plan used by Wells Fargo to compensate members of the FX Sales and Trading Teams.

[Dkt. No. 3 at pp. 140-141; Fowles Complaint, ¶¶ 1, 3]. Fowles continued to allege that:

> In mid-September of 2017, [Fowles] made it very clear to upper management that he intended to inform federal regulators of the significant ethical, legal, and regulatory issues he had noted and been complaining about concerning the FX Sales teams' use of the cash-based incentive program..."

[Dkt. No. 3 at pp. 146-147].

Mr. Fowles was terminated by Wells Fargo Bank, along with other FX executives on October 16, 2017. [Dkt. No. 3 at pp. 141 and 146-148, Fowles Complaint, ¶¶ 2, and 24-26].

The First Subpoena

When Plaintiffs discovered the Fowles Complaint, Plaintiffs' counsel made multiple meet and confer telephone calls to Mr. Fowles' attorney, Daniel Feder, receiving assurances from Mr. Feder's secretary that Mr. Feder would return the telephone calls, but he never did. [Dkt. No. 11 at p. 2; Winters Decl. ¶ 4]. As a result, on October 12, 2018, Plaintiffs were obliged to serve Mr. Fowles with a subpoena at his residence in Petaluma, California, near San Francisco with notice to all Defendants for the taking of Mr. Fowles' deposition on November 28, 2018 at

10:00 a.m. at the Offices of *Nypl* Plaintiffs' counsel in San Francisco, California. [Dkt. No. 11 at pp. 2 and 6-19; Winters Decl. ¶ 4 and Exhibit A].

The subpoena at issue sought testimony and documents from whistleblower Simon Fowles, a resident of the Northern District of California, and the former Head of FX ("foreign currency") trading at Wells Fargo Bank, N.A. The subpoena sought the following information from Mr. Fowles:

> Schedule A. Topics of Deposition - Topic No. 1: "The reasons given by Mr. Simon Fowles in support of his complaint filed on April 11, 2018."
>
> Schedule B. Requests for Documents and Things - Request No. 1 - "any and all documents, things, communications, and information that support his allegations, including notes, memoranda, or other documents."

[Dkt. No. 11 at pp. 16-17].

The Southern District of New York Compelled the Deposition of Mr. Fowles and then Rescinded Its Order Because the New York Court Believed it Did not Have Jurisdiction to Compel Mr. Fowles' Deposition in California

October 22, 2018, Mr. Feder sent Plaintiffs' counsel an e-mail objecting to the Subpoena, claiming that, Fowles has no knowledge of the cartel chatroom and that "Plaintiff has no knowledge, documentation, communications, information, etc., that relates to FX benchmark rate fixing within the FX market." [Dkt. No. 11 at p. 23; Winters Decl., Exhibit B, at p. 3]. On October 24, 2018, Mr. Feder served Plaintiffs' counsel an Objection to the Subpoena to Simon Fowles, containing, for the most part, boilerplate objections. [Dkt. No. 11 at pp. 26-28; Winters Decl. Exhibit C]. Mr.

Fowles' Objection did not contain a declaration or sworn affidavit, and no such document from Mr. Fowles exists in the record.

In the face of Fowles' objection, on November 13, 2018, Plaintiffs' counsel filed and serve a pre-conference motion in the underlying action to enforce the subpoena seeking testimony and documents from Mr. Fowles. [Dkt. No. 11 at pp. 30- 35; Winters Decl., Exhibit D]. On November 14, 2018, the Court entered an order requiring Plaintiffs to submit a declaration with the facts outlined in its pre-conference motion. [Dkt. No. 11 at p. 40; Winters Decl. Exhibit E]. In that declaration, Plaintiffs established that:

> Discovery in the *Nypl* action has revealed hundreds of pages of documents that show that Wells Fargo Bank per Thomas Kiefer was an active participant in the FX chat rooms with competitor banks in which the manipulation and price-fixing of foreign exchange rates took place. (A sample of some of the beginning Bates numbers for these documents are RBS_NYPL,0030046 etc., RBS_NYPL-0030099 etc., RBS_NYPL-0031417 etc.).

[Dkt. No. 11 at p. 4; Winters Decl. ¶ 8].

On November 19, 2018, counsel for Mr. Fowles, Daniel Feder filed a letter on behalf of Mr. Fowles claiming Fowles has no personal knowledge related to the Plaintiffs' claims. [S.D.N.Y. Dkt. No. 374]. Notwithstanding Mr. Fowles' claims, on November 20, 2018, the New York Court issued an order granting Plaintiffs' Motion to Compel the deposition of Fowles and further ordered Mr. Fowles to produce the documents requested in Schedule B of the Subpoena. [Dkt. No. 3 at p. 154]. The Court ordered Mr. Fowles to submit a letter with his objections, including any

claims of privilege, to the deposition or subpoena duces tecum on or before November 23, 2018. *Id*.

Instead, on November 23, 2018, Wells Fargo, not Fowles, filed a letter objection. In that objection, Wells Fargo contended that, "the Federal Rules do not authorize this Court to compel compliance in another federal judicial district." [Dkt. No. 3 at p. 157]. Wells Fargo also claimed that the information sought was not relevant to the proceedings and purportedly implicated sensitive and confidential information of Wells Fargo. [Dkt. No. 3 at pp. 158-159].

On November 26, 2018, Judge Schofield of the Southern District of New York, apparently persuaded by Wells Fargo's arguments, rescinded her November 20, 2018, Order, because, "In this case, the appropriate district to bring a motion to compel is the Northern District of California." [Dkt. No. 3 at p. 162]. The November 20 Order was not rescinded on the basis that the Subpoena sought irrelevant information.

The Second Subpoena

On November 27, 2018, the *Nypl* Plaintiffs served a second subpoena on Simon Fowles setting his deposition at *Nypl* Plaintiffs' counsel's office in San Francisco, California, within 100 miles of his residence in Petaluma, California, at 10:00 a.m. on December 19, 2018, with Notice thereof served on all *Nypl* Defendants. The Subpoena listed the following deposition topics and requested the following documents:

> Schedule A. Topics of Deposition-Topic No. 1: The reasons given by Mr. Simon Fowles in support of his complaint filed on April 11, 2018.
>
> Schedule B. Requests for Documents and Things - Request No. 1 - "any and all documents, things, communications, and information that support his allegations, including notes, memoranda, or other documents."

[Dkt. No. 11 at pp. 58-70].

Appellees' Motion to Quash and Plaintiffs' Motion to Compel

On November 28, 2018, Wells Fargo, joined by Fowles, filed a Motion to Quash the Subpoena in the United States District Court for the Northern District of California, Case No. 18-mc-80209-JCS. [Dkt. No. 1 at pp. 1-13; Dkt. No. 2 at pp. 1-3; Dkt. No. 3 at pp. 1-175]. On December 5, 2018, the *Nypl* Plaintiffs filed an Opposition to the Motion to Quash and a Motion to Compel the deposition of Fowles and the production of the requested documents. [Dkt. No. 6 at pp. 1-10; Dkt. No. 11 at pp. 1-70]. On December 17, 2018, Fowles joined in Wells Fargo's Opposition to Plaintiffs' Motion to Compel and in Wells Fargo's Motion to Quash. [Dkt. No. 15]. On December 19, 2018, Wells Fargo filed its Opposition to Plaintiffs' Motion to Compel and its Reply in Support of its Motion to Quash. [Dkt. Nos. 17 and 18]. On December 21, 2018, Plaintiffs filed a Reply Brief in Support of their Motion to Compel. [Dkt. No. 18 at pp. 1-5].

The Ruling of the Magistrate Judge

A hearing was held before Magistrate Judge Joseph C. Spero on January 18, 2019. [App. 11-27; 1/28/19 Hrg. Tr.]. Magistrate Judge Spero granted the Motion to Quash and made no reference to Plaintiffs' Motion to Compel, holding that:

> The subpoena issue is very simple in scope. It seeks topics -- it seeks to have a deposition of Mr. Fowles about the – a basis for his allegations in his April 11th, 2011 wrongful termination complaint against the bank and documents that support those allegations.
>
> The topic of the Southern District action, the Nypl action, is a claim of price fixing in the benchmark exchange rates for foreign currency, the FX benchmarks. The allegation is that the conspirators coordinated their trades in connection with the two daily fixes and another action in connection with the two daily fixes like withholding bids in order to manipulate that price. The topic of the Fowles complaint has nothing to do with that. The topic of the Fowles complaint is wrongful termination and retaliation for opposing alleged illegal conduct by the bank.
>
> The allegation is that the compensation plan for the foreign exchange sales persons -- can't remember exactly what they were called, but -- was based on revenue which would result in significant risk of illegal conduct such as not adhering to a customer's spread agreement or overcharging the client of the bank on FX transactions, illegally increasing the spreads, and customers at year-end to -- so they can make their numbers, and the Department of Justice has been asking questions about one particular transaction, whether it generated revenue for the bank that should have been shared with the customers. The allegations of that complaint do not concern price fixing of the benchmark rate for foreign exchange currency. Period.
>
> The unlawful conduct that's referred in the Fowles' complaint is unrelated to that -- that matter of the benchmark price and is not related to a price-fixing conspiracy.
>
> The fact that -- just as an aside -- that another employee other than Mr. Fowles -- I think his name is Keefer (ph) -- participated in the chat room where non -- employees of other banks engaged in price fixing,

> not this particular bank – Wells Fargo -- it does not make the deposition or the documents relevant. First of all, it's not Mr. Fowles and it's not a topic of Mr. Fowles' complaint, more particularly, which is all you have subpoenaed. And there's no connection between Mr. Fowles and the chat room and, you know, we're not here to discuss whether Mr. Keefer can be deposed, but there's not even an effort to show that what Mr. Keefer did in the chat room had anything to do with illegal activity.
>
> ***
>
> All right. Tentative is confirmed. Motion is granted. The subpoena is quashed.

[App. 14:10-5:25 and 23:21-22] [emphasis added].

Objection to the Magistrate Judge's Ruling

On February 1, 2019, pursuant to Fed. R. Civ. P. 72(a) and Civil Local Rule 72-2, the *Nypl* Plaintiffs filed a Motion for Relief from Non-Dispositive Pretrial Order of a Magistrate Judge. [Dkt. Nos. 23; 23-1; 23-2; 23-3]. On February 13, 2019, that Motion was denied by District Judge Beth Labson Freeman on the following grounds:

> Judge Spero noted that "[t]he topic of the Fowles complaint has nothing to do with [Plaintiff's action]." *See* Hearing Transcript at 4:21–22. Judge Spero thoroughly explained how and why the respective actions are different. *See id.* at 4:15–5:13. Judge Spero therefore reasoned that deposition of Simon Fowles was not warranted because "[t]he allegations of [the Fowles] complaint do not concern [the allegations of Plaintiff's complaint]." *See id.* at 5:9–10. In other words, Judge Spero found that "just because [Fowles is] involved in the exchange rate business and he blew the whistle on Wells Fargo with respect to an aspect of the exchange rate business [has nothing] to do with price fixing [as alleged by Plaintiff]." *See id.* at 7:19–23. This Court agrees with Judge Spero's conclusion that Plaintiff's counsel did not demonstrate the relevance of the Fowles deposition and show that it was more than a fishing expedition. *See id.* at 14:19–15:4.

[App. 6-7].

On February 15, 2019, Plaintiffs filed a Notice of Appeal. [Dkt. No. 25].

On April 28, 2020, the Ninth Circuit affirmed the decision of the lower court. [App. 1-15]. The Ninth Circuit denied Plaintiffs' Petition for rehearing on July 1, 2020. [App. 9].

REASONS FOR GRANTING THE PETITION

I. THE DECISIONS OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND THE LOWER COURT SO FAR DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AND PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW REGARDING THE BURDEN ON THE MOVING PARTY ON A MOTION TO QUASH THE SUBPOENA OF A THIRD-PARTY WITNESS

The primary basis for the Respondents' Motion to Quash was that it posed an "undue burden" because the subpoena sought information irrelevant to the underlying proceedings. [Dkt. No. 1 at p. 9]. Under Fed R. Civ. P. 45, on a motion to quash, the moving party bears the burdens of proof and persuasion, not the requesting party.[1] *See* Fed. R. Civ P. 45(d)(3) and *Virginia Dept. of Corrections v. Jordan*, 921 F.3d 180, fn.2. (4th Cir. 2019) ("We do not mean to imply that, on a motion to quash, the requesting party bears the burdens of proof and of persuasion. **The moving party bears those burdens**." emphasis added.) At the hearing, the lower court turned that burden on its head:

[1] At the hearing, the lower court ruled only on the Motion to Quash filed by Wells Fargo and joined by Fowles. [App. 14:10-0015:25 and 23:21-22; Tr. p. 4:10-5:25 and 13:21-22]. It never explicitly ruled on Plaintiffs' pending Motion to Compel.

> ALIOTO: Well, they've done none of that, so Your Honor has nothing in front of the Court by them except their lawyer's argument – no affidavit, no disclaimer, no document, no document offered.
>
> THE COURT: Well, of course the burden's on you, not them.
>
> MR. ALIOTO: The burden on me is to ask for discovery.
>
> THE COURT: No.
>
> MR. ALIOTO: And –
>
> THE COURT: That's not -- that's not the burden. The burden is cause. You have to tell me why this is relevant and not overburdensome and just a fishing expedition with respect to a non-party. That's your burden.
>
> MR. ALIOTO: A fishing expedition, Your Honor?
>
> THE COURT: Uh-huh.

[App. 24:10-25:4; (1/18/19) Hrg. Tr. 14:10-15:4].

Rule 45(d)(3) authorizes parties and non-parties to file "timely" motions to quash subpoenas that "subject[] a person to an undue burden." Below, the Petitioners argued that the subpoena presented an undue burden because it requested information irrelevant to the underlying action. [Dkt. No. 1 at p. 10]. By claiming that a subpoena subjects a person to an undue burden because it seeks irrelevant information, a moving party cannot shift its burden to the requesting party. Yet, that is precisely the approach the Ninth Circuit sanctioned here. The lower court conducted an erroneous relevance analysis and stopped the inquiry there. Rather, the lower court should have employed a balancing test to determine, as a whole, whether the subpoena of Fowles was unduly burdensome.

The Federal Circuit case, *Truswal Systems Corp. v. Hydro-Air Engineering, Inc*, 813 F.2d 1207 (Fed. Cir. 1987) conflicts with the Ninth Circuit's decision. In *Truswal*, Hydro-Air, a non-party, moved to quash a subpoena served on it by the plaintiff Truswal under Rule 45, on similar grounds to those here, that "the information sought is not reasonably calculated to lead to the discovery of admissible evidence in the pending litigation, and that the discovery of such information would be unreasonable, unduly oppressive and burdensome." *Id*. at 1208. The *Truswal* court explained that in moving to quash, Hydro-Air, "thus undertook the burden of showing that the subpoena is unreasonable and oppressive. 'The burden is particularly heavy to support a 'motion to quash as contrasted to some more limited protection. (citations omitted.)'" *Id*. at 1210. *Truswal* articulated a balancing test on a motion to quash as follows: "The district court must balance 'the relevance of the discovery sought, the requesting party's need, and the potential hardship to the party subject to the subpoena.' *Heat & Control, Inc.,* 785 F.2d at 1024, 228 USPQ at 931 (citing *Deitchman v. E.R. Squibb & Sons, Inc.,* 740 F.2d 556, 560, 564 (7th Cir.1984)); 5A *Moore's Federal Practice,* ¶ 45.05[3], at 45–44." The court in *Truswal* reversed the lower court's ruling quashing the subpoena, explaining that:

> Nothing in the order indicates that any balancing was done between relevancy of and Truswal's need for the information sought, on the one hand, and Hydro-Air's potential hardship on the other hand. Nor did the district court say whether it considered the subpoena "unreasonable or oppressive." Fed.R.Civ.P. 45(b)(1). Nor did the district court refer to payment of costs. Fed.R.Civ.P. 45(b)(2). Nor did

> the district court articulate any of the concerns expressed in Rule 26(b)(1)(i), (ii), or (iii). Nor does the order refer at any point to the potential for use of a protective order under Rule 26(c).

Id. at 1211. Similarly, here no balancing test was ever undertaken before the lower court quashed the subpoena. Further, just as in *Truswal*, the lower court did not say that it considered Plaintiffs' Subpoena to be unduly burdensome or point to a potential use of a protective order. Instead, the lower court required Plaintiffs to establish that the Subpoena was not a "fishing expedition" while, at the same time, holding that the Respondents were not required to submit any affidavits or evidence whatsoever averring that they did not possess information relevant to the claims in Plaintiffs' TAC. The analysis undertaken by the court in this case conflicts with *Truswal*.

The Fifth Circuit in *Wiwa v. Royal Dutch Petroleum*, 392 F.3d 812, 818 (5th Cir. 2004) has adopted a similar standard to that of *Truswal*:

> The moving party has the burden of proof to demonstrate "that compliance with the subpoena would be 'unreasonable and oppressive.' " "Whether a burdensome subpoena is reasonable 'must be determined according to the facts of the case,' such as the party's need for the documents and the nature and importance of the litigation." To determine whether the subpoena presents an undue burden, we consider the following factors: (1) relevance of the information requested; (2) the need of the party for the documents; (3) the breadth of the document request; (4) the time period covered by the request; (5) the particularity with which the party describes the requested documents; and (6) the burden imposed.

The analysis set forth in *Wiwa* was never undertaken by either court in this case.

Further, the recent Ninth Circuit case, *Mount Hope Church v. Bash Back!*, 705 F.3d 418 (9th Cir. 2012) also conflicts with the approach undertaken by the Court in this case. In *Mount Hope Church*, the Ninth Circuit analyzed the undue burden sanction provisions contained within Fed. R. Civ. P. 45(c)(1). In conducting that analysis, the Ninth Circuit noted that the test it was employing was similar to that used by, "[s]ome courts…to determine whether an undue burden exists, usually in the context of modifying or quashing a subpoena under Rule 45(c)(3)'s identical 'undue burden' language. *Wiwa v. Royal Dutch Petroleum Co.,* 392 F.3d 812, 818 (5th Cir.2004); *Precourt v. Fairbank Reconstruction Corp.,* 280 F.R.D. 462, 467 (D.S.D.2011) (citations omitted)." *Id.* at 425, fn.8. In analyzing identical undue burden language in Rule 45, the Ninth Circuit implemented a test "similar" to that of *Wiwa.* Thus, the Ninth Circuit's holding in *Mount Hope* suggests that it should have, but did not, adopt an analysis similar to that of *Wiwa*—an analysis that was not undertaken by the lower court in this case. Thus, the Ninth Circuit's decision in this case conflicts with its own authority.

A. The Ninth Circuit and the Lower Court in this Case Refused to Give Any Weight to the Decision of the Court Where the Action is Pending in Contravention to Fed. R. Civ. P. 45 and the Federal Circuit's Decision in *Truswal*

The scope of the discovery that can be requested through a subpoena under Rule 45 is the same as the scope under Rule 26(b). Fed. R. Civ. P. 45 Advisory Comm.'s Note (1970) ("[T]he scope of discovery through a subpoena is the same as that applicable to Rule 34 and other discovery rules."); Fed. R. Civ. P. 34(a) ("A

party may serve on any other party a request within the scope of Rule 26(b).”). Rule 26(b) allows a party to obtain discovery concerning any nonprivileged matter that is relevant to any party’s claim or defense and that is “proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.” Fed. R. Civ. P. 26(b)(1).

Even though a “district court whose only connection with a case is supervision of discovery ancillary to an action in another district should be ‘especially hesitant to pass judgment on what constitutes relevant evidence thereunder, (citations omitted)’” here, the lower court expressed no such hesitance. *Truswal Systems,* 813 F.2d at 1211–12. “Where relevance is in doubt ... the court should be permissive.” *Id.* This is especially so under the circumstances here where the District Judge in the underlying action previously compelled the deposition and production of documents but rescinded that order on the grounds that it lacked the authority to issue that order. The lower court judge acknowledged that Judge Schofield, the District Judge overseeing the consolidated benchmark exchange rate price fixing cases in the Southern District of New York, found Plaintiffs’ Subpoena to seek relevant testimony and documents but rescinded her order for other reasons:

> THE COURT: Well, I don’t know that. That’s not entirely correct. If she [Judge Schofield] thought it was irrelevant, they wouldn’t have

> issued the first order so, you know, this is an excellent judge in New York. She doesn't do things without thinking about them. She obviously thought about it and knows this is a nonparty and thought it was relevant. And she may have been persuaded afterwards that someone else should make that decision, and I respect that.

[App. 26:5-12; (1/18/19) Hrg. Tr. at p. 16:5-12]. Thus, even though the lower court acknowledged that Judge Schofield found the Subpoena to seek testimony relevant to the *Nypl* Plaintiffs' claims, the lower court gave the determination of the District Judge overseeing the antitrust conspiracy proceedings no weight.[2] This decision conflicts with Fed. R. Civ. P. 45 and *Truswal*.

CONCLUSION

Petitioners respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit in this case, reverse and remand, and order the deponent to comply with the subpoena.

Respectfully submitted,

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[2] As an alternative, the lower court could have transferred the motion back to the Southern District of New York under Fed. R. Civ. P. 45(f).